No. 87-1201

In The
Supreme Court of the United States
October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Petitioners.

v.

ERNST & WHINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the Petitioners' request for discretionary prejudgment interest constitute a motion under Rule 59(e) of the Federal Rules of Civil Procedure which rendered their notice of appeal untimely pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure?

2. If the Petitioners' request for prejudgment interest is to be considered a Rule 59(e) motion, did the Eleventh Circuit err in refusing to hear the appeal under the "unique circumstances" doctrine?

PARTIES

The following persons and entities were parties to the proceeding in the Court of Appeals: Myles Osterneck, Guy-Kenneth Osterneck, Myles and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E.T. Barwick Industries, Inc., M.E. Keller, B.A. Talley (Defendants-Cross Appellants); Eugene Barwick, Ernst & Whinney (Defendants-Appellees).

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The Court of Appeals' opinion sought to be reviewed is reported at 825 F.2d 1521 and appears in the Joint Appendix at J.A. 49. Additional orders of the Court of Appeals and District Court, which are not reported also appear in the Joint Appendix as follows: the Judgment entered on the merits in the District Court (J.A. 6), the District Court's order determining that prejudgment interest is a separate issue and directing entry of judgment as soon as possible (J.A. 4), the District Court's order granting prejudgment interest (J.A. 39) and the judgment adding prejudgment interest (J.A. 44).

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JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals of the Eleventh Circuit was entered on August 31, 1987. The Eleventh Circuit denied Petitioners' Suggestion of Rehearing In Banc and Petition for Rehearing on October 19, 1987. The petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was filed in this Court on January 15, 1988. This Court granted the Writ of Certiorari in this case on June 6, 1988.

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FEDERAL STATUTES AND RULES INVOLVED

28 U.S.C. § 1291:

Final Decisions of District Court.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal

Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct view may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in § 1292(c) and (d) and § 1295 of this title.

Rule 54 of the Federal Rules of Civil Procedure:

Judgment; Costs

(a) *Definition; Form.*

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.*

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct entry as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction for the entry of judgment. . . .

Rule 58 of the Federal Rules of Civil Procedure:

Entry of Judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the

judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment.

A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment.

Rule 4(a) of the Federal Rules of Appellate Procedure:

(a) *Appeals in Civil Cases.*

1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

. . .

3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

. . .

6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

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STATEMENT OF THE CASE

This case arises out of the 1969 merger of Cavalier Bag Co. with E.T. Barwick Industries, Inc. ("Barwick Industries"). Petitioners Myles Osterneck, et al. ("the Osternecks"), who owned Cavalier Bag Co. until that time, exchanged their stock in Cavalier for Barwick Industries stock. (R1-1). Sometime later the Osternecks became aware that the audited financial statements of Barwick Industries for the fiscal years 1968 through 1975 vastly overstated the financial condition of Barwick Industries. The Osternecks had relied on these financial statements and other representations in deciding to approve the merger and in deciding to purchase and retain additional stock in Barwick Industries after the merger. (R34-1244-45, R39-2073-75, R43-3125, R45-3129 R50-4006).

On September 4, 1975 the Osternecks filed this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240.10b-5) and the common law of Georgia. (R1-1) In addition to Barwick Industries and several other individuals and organizations, the accounting firm of Ernst & Whinney ("E & W") was named as a defendant. E & W had not only prepared the inflated financial statements, but also had actively participated in the merger and had received a substantial fee from the Osternecks pursuant to the merger agreement. (R37-1656-59, R-39-2070, R50-4011). The Osternecks alleged that E & W was liable for negligence as well as common law fraud and securities fraud.

Although the Osternecks' negligence claims against E & W were dismissed, apparently on the ground that no privity existed between E & W and the Osternecks, the Osternecks' remaining claims were tried before a jury almost ten years after the complaint was filed. Trial of the case lasted three and one-half months. At the close of evidence the trial court ruled that the Osternecks' claim against E & W did not include common law fraud. (R77-8047). Subsequently, the jury returned a verdict which determined liability as to all parties and awarded damages against Barwick Industries and two individual defendants on the Osternecks' securities and common law fraud claims. (J.A. 1). The jury, however, found that E & W was not liable under the securities laws. (J.A. 1).

Immediately after the jury verdict was announced, the Osternecks orally moved that prejudgment interest be included in the judgment. (J.A. 5). The District Court held, however, that the question of prejudgment interest must be handled "separately" from the judgment on the

merits and deferred ruling on the issue. (J.A. 4-5). In the same ruling, the District Court expressly determined that judgment should be entered "as soon as possible" and directed the clerk to enter judgment accordingly. (J.A. 5).

> The Court: There's another matter that has to be brought to the Court on this issue, that is, prejudgment interest on this particular verdict, but I am going to have to handle that separately and have it argued to me.
>
> . . .
>
> The Court: All right. I will hear the motion concerning prejudgment interest. I know it's going to be offered from the plaintiffs. Just state on the record that you are going to move for prejudgment interest.
>
> Mr. Webb: Yes, Your Honor, we are. We do move for prejudgment interest in favor of the plaintiffs against the defendants against whom the verdicts were returned.
>
> The Court: In view of the fact that I do not wish to have it argued right now and based on the request of the lawyers, I will allow it to be submitted in writing.
>
> The plaintiffs will have ten days to present to the judge the plaintiffs' position on prejudgment interest and the affected defendants will have ten days thereafter, after they receive a copy of the brief and submission of the plaintiffs' to respond and then the judge will rule on it.
>
> The judge will direct the clerk to issue a judgment on the verdict and I don't think—I think it can be done without having to have the lawyers submit proposed judgments. Sometimes you have to do that, but I think it can be figured out, Ms. Daniels. If you need any assistance you can talk to the judge.
>
> The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is granted it will be—the judgment can be amended.

(J.A. 4-5).

In accordance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, judgment was entered on the jury verdict later the same day, January 30, 1985. (J.A. 6-7).

Pursuant to the trial judge's instructions, the Osternecks filed in writing their request for prejudgment interest several days later. (J.A. 8-9). In addition, believing that the District Court erred in dismissing their negligence and fraud claims against E & W and in its rulings on certain evidentary questions and jury charges, the Osternecks filed a notice of appeal on March 1, 1985. (J.A. 34). In fact, all parties filed notices of appeal from the January 30 judgment in March 1985. (J.A. 2, R23-475-477, 482-484).

In July 1985, the District Court awarded the Osternecks prejudgment interest and entered an "Amended Judgment" directing that prejudgment interest be "added" to the earlier "final judgment". (J.A. 39, 44-45). Although styled "Amended Judgment," the July 1985 judgment did not change any rights which had been established by the January 30, 1985 judgment. (J.A. 44-45). To the contrary, the July 1985 judgment expressly provided that the January judgment would "remain the same" in every respect other than the addition of prejudgment interest to the amount awarded by the jury on the merits of the federal securities claim. (J.A. 45).

Almost two months after the July 1985 order, the clerk of the Eleventh Circuit raised a question as to whether the Osternecks' motion for prejudgment interest should be considered a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure which would render the Osternecks' March 1, 1985 notice of appeal invalid. (11th Cir. Rec. Letter of clerk dated

9/5/85).[1] Prior to this time, no one involved in this case had ever considered the Osternecks' motion for prejudgment interest to be a Rule 59(e) motion which would invalidate all prior notices of appeal.

For example, in April, 1985 the Eleventh Circuit raised an unrelated jurisdictional question regarding the timeliness of the Osternecks' March 28, 1985 notice of cross appeal against Barwick Industries, which was filed 14 days after Barwick Industries' first notice of appeal. (11th Cir. Rec., letter of clerk dated 4/8/85). Although the Eleventh Circuit questioned the timeliness of the notice of cross appeal under F.R.A.P. 4(a)(3) because the notice was not filed within fourteen days of the first notice filed by any party in the case, it did not not question whether the pending motion for prejudgment interest was a Rule 59(e) motion which would affect the timeliness of any of the notices of appeal under F.R.A.P. 4(a)(4). *Id.* In a brief filed with the Eleventh Circuit in April 1985 on this issue, E & W stated that the Osternecks' March 1 notice of appeal was the first "timely filed" notice of appeal from a "final judgment." (11th Cir. Rec., E & W brief filed on 4/22/85, at 3, 7). In addition, two of the parties to the appeal filed a stipulation in the Eleventh Circuit that the Osternecks' March 15, 1985 notice of cross appeal was timely. (J.A. 37).

Moreover, the District Court required the Osternecks to pay an additional filing fee for their notice of

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[1] The clerk of the Eleventh Circuit has certified for inclusion in the record several items which were filed in the Eleventh Circuit and which are relevant to this review. Those items are cited by reference to the Eleventh Circuit Record ("11th Cir. Rec.") with a brief description of the item following.

cross appeal filed after the District Court's award of prejudgment interest. (J.A. 59). Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that such an additional filing fee is not required when a new notice of appeal is filed after an order entered on a Rule 59(e) motion. E & W filed its notice of appeal from the award of costs on the January 30 judgment in June 1985 and failed to renew the notice after the order awarding pre-judgment interest as would have been required if the Osternecks' motion for prejudgment interest were a Rule 59(e) motion. (R23-504). The District Judge treated the January 30, 1985 judgment as the *final* judgment notwithstanding the pending motion for prejudgment interest when in May 1985 he denied as untimely E.T. Barwick's motion for an extension of time to file a bill of costs. (J.A. 35). Indeed, even in granting the motion for prejudgment interest, the District Judge continued to refer to the January 30, 1985 judgment as the "final" judgment. (J.A. 44).

The Osternecks filed a brief in the Eleventh Circuit on September 19, 1985 on the jurisdictional question regarding the March 1, 1985 appeal. In an order dated October 30, 1985, the Eleventh Circuit held that "the jurisdictional issues are carried with the case." (J.A. 48). On August 31, 1987 the Court of Appeals held that a post-judgment motion for discretionary prejudgment interest is a Rule 59(e) motion and dismissed the Osternecks' appeal as untimely pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure. (J.A. 49). Prior to its August 31, 1987 decision, the Eleventh Circuit had never before held that a motion for prejudgment interest constituted a Rule 59(e) motion.

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SUMMARY OF ARGUMENT

This case raises the jurisdictional question of whether a post-judgment motion for prejudgment interest suspends the finality of the judgment for purposes of appeal. Established precedent demonstrates that such a motion should not affect the finality of the judgment.

The rules of judicial procedure which govern this jurisdictional question are found in § 1291 of the Judicial Code (28 U.S.C. § 1291), Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R.A.P."), and Rule 59(e) of the Federal Rules of Civil Procedure ("F.R.Civ.P."). Section 1291 provides that the "Court of Appeals . . . shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . ." F.R.A.P. 4(a)(1) provides that a notice of appeal shall be filed in the District Court within thirty days after entry of the judgment or order appealed from. Rule 4(a)(4), however, modifies Rule 4(a)(1) by providing that if a timely motion to alter or amend judgment is filed in the District Court by any party under F.R.Civ.P. 59(e), the time of appeal for all parties runs from the entry of the order granting or denying such a motion. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment."

Traditionally, this Court has taken a practical approach in determining whether a judgment is final and appealable under the federal rules. Under this approach, a judgment which effectively terminates the litigation is final and appealable if the rights which it adjudicates are not subject to change by subsequent proceedings in the district court. The reservation of issues for determination after entry of a judgment on a jury verdict on the

merits, therefore, has no effect on the finality and appealability of the judgment if resolution of the issues could not moot or revise what has already been adjudicated. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 308-09 (1962); *Dickinson Petroleum Conversion Corp.*, 338 U.S. 507, 513-16 (1950). Likewise, a post-judgment motion which does not seek to change what has already been established by the judgment does not affect the finality or appealability of the judgment. *FTC v. Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206, 211-213 (1952); *Dept. of Banking v. Pink*, 317 U.S. 264, 266 (1942).

The Supreme Court has made it clear that the finality of such a judgment remains intact regardless of whether the subsequent proceedings involve "merits" because the judgment is "independent of and unaffected by" the subsequent proceedings. *Budinich v. Becton Dickinson And Co.*, — U.S. —, 108 S.Ct. 1717, 1721 (1988); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945). Conversely, the Supreme Court has made it clear that if a post-judgment motion does seek to change what has already been decided, or if a subsequent judgment alters previously adjudicated rights, then the time for appeal runs from the disposition of the motion or from the subsequent judgment. *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943).

This traditional approach to the finality and appealability of judgments is compatible with and a natural consequence of the provision in F.R.A.P. 4(a)(4) which suspends the finality of a judgment upon the filing of a Rule 59(e) motion. Legislative history and case law demonstrate that a Rule 59(e) motion, by definition, requests a change in what has already been decided. *White*

v. New Hampshire Dept. of Emp. Sec., 455 U.S. 445 (1982); *Boaz v. Mutual Life Ins. Co. of New York*, 146 F.2d 321 (8th Cir. 1945). Thus, a Rule 59(e) motion would suspend the finality of a judgment until disposal of the motion under the traditional approach as well as under Rule 4(a)(4). On the other hand, because a post-judgment motion which does not seek to change what has already been decided is not a Rule 59(e) motion, it does not suspend the finality of the judgment under F.R.A.P. 4(a)(4) or under the traditional analysis. *See Budinich, supra*, 108 S.Ct. at 1720-21; *Buchanan v. Stanships, Inc.*, — U.S. —, 108 S.Ct. 1130 (1988). In effect, F.R.A.P. 4(a)(4) and Rule 59(e) by operation embrace the traditional approach to finality of judgments for purposes of appeal. *FCC v. League of Women Voters of California*, 468 U.S. 364, 373-74, n. 10 (1984).

The above principles and rules of appellate procedure require that the Eleventh Circuit's dismissal of the Osternecks' March 1, 1985 appeal be reversed. The Osternecks filed their March 1, 1985 notice of appeal within 30 days of the January 30, 1985 judgment in accordance with F.R.A.P. 4(a)(1). The January 30 judgment which was entered on the jury verdict on the merits was final under 28 U.S.C. § 1291 for purposes of appeal because it effectively terminated the litigation as to all parties. The trial court's reservation of the question of prejudgment interest for subsequent determination did not suspend the finality of the judgment because resolution of the prejudgment interest question could not moot or revise the rights which were established by the January 30 judgment. The rights adjudicated in the January 30 judgment remained at all times "independent of, and unaffected by" the resolution of the prejudgment interest issue. *See Budinich, supra*, 108 S.Ct. at 1721. Indeed, the "amended judgment" expressly provided that the provisions of the January 30 judgment would remain intact. (J.A. 45).

Likewise, the Osternecks' motion for prejudgment interest did not suspend the finality of the January 30 judgment because the motion did not seek to change or correct anything that had already been decided. To the contrary, the motion merely sought resolution of a collateral, independent issue which had intentionally not yet been considered or decided by the court. Because the motion did not seek to change anything in the judgment, it cannot be construed as a Rule 59(e) motion which would toll the time for filing the notice of appeal under F.R.A.P. 4(e)(4). *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), cert. den. — U.S. —, 107 S.Ct. 324 (1986). Furthermore, as *Budinich, supra*, makes clear, the prejudgment interest question did not disturb the judgment's finality regardless of whether prejudgment interest is related to the "merits" of the action.

Accordingly, because the time for filing the notice of appeal was not suspended by the motion for prejudgment interest, the Eleventh Circuit erred in dismissing the Osternecks' March 1, 1985 appeal.

Finally, even if the Osternecks' motion for prejudgment interest is now construed as a Rule 59(e) motion, the Eleventh Circuit erred in dismissing the Osternecks' appeal in light of the "unique circumstances" doctrine. Under the "unique circumstances" doctrine, an appeal should not be dismissed as untimely where the appellant

relied on statements or actions of the district court in determining when to file a notice of appeal. *E.g. Thompson v. Immigration and Naturalization Serv.*, 375 U.S. 384 (1964). Because the Osternecks relied on the statements and actions of the District Court in determining when to file their notice of appeal, the Eleventh Circuit erred in dismissing the Osternecks' appeal as untimely.

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ARGUMENT AND CITATION OF AUTHORITIES

I. The Well-Established Principles And Rules Of Federal Procedure Require That The Eleventh Circuit's Dismissal Of The Osternecks' March 1, 1985 Appeal Be Reversed.

A. Under Traditional Principles of Appellate Procedure, A Judgment Which Effectively Terminates The Litigation Is Final And Appealable If The Rights Which It Adjudicates Are Not Subject To Change By Subsequent Proceedings In The District Court.

This Court has repeatedly stated that a judgment is final for purposes of appeal when it terminates the litigation on the merits and "leaves nothing to be done but to enforce by execution what has been determined." *E.g. Catlin v. United States*, 324 U.S. 229, 233 (1945); *Berman v. United States*, 302 U.S. 211, 213 (1937). This Court has made it clear, however, that the concept of finality under 28 U.S.C. § 1291 does not require a judgment completely disposing of every matter or issue that arises in the litigation. *E.g. Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *Gillespie v. United States Steel Corp.*, 379 U.S.

148, 152 (1964). Rather, the § 1291 requirement of finality "is to be given a 'practical rather than a technical construction.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). An order during the course of a case, therefore, may be sufficiently independent to be deemed a final decision under § 1291 under the "collateral order" doctrine described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-46 (1949). Likewise, a judgment may be final for purposes of appeal under F.R.Civ.P. 54(b) notwithstanding the pendency of additional claims where such additional claims are separable from and could have no effect on what had already been decided in the judgment. F.R.Civ.P. 54(b); *In re Flight Trans. Corp. Sec.*, 825 F.2d 1249, 1251 (8th Cir. 1987); *Exchange Nat. Bank of Chicago v. Daniels*, 763 F.2d 286, 291 (7th Cir. 1985).

Adhering to the traditional, practical principles of finality which are embraced by the *Cohen* doctrine and Rule 54(b), this Court has determined that a question remaining to be decided after an order effectively terminating litigation on the merits does not prevent finality if its resolution could not change the legal rights which have been plainly and properly set forth in the initial judgment. *Brown Shoe Co. v. United States*, 370 U.S. 294, 308 (1962); *FTC v. Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206, 211-213 (1952); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 515-16 (1950); *Dept. of Banking v. Pink*, 317 U.S. 264, 266 (1942); *Berman, supra*, 302 U.S. at 213. *See also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945) (Review of a prior judgment was allowed because it "is independent of and unaffected by" the subsequent proceeding).

> Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower Court *changes* matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. *The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, have been plainly and properly settled with finality.*

Minneapolis-Honeywell, supra, at 211-212 (emphasis added).

Accordingly, in *Minneapolis-Honeywell, supra,* this Court refused to construe a post-judgment filing as a motion to amend the judgment which would suspend the time for appeal because the filing did not seek to change what had been established by the judgment. In that case, several antitrust issues were raised on appeal. When it became apparent that the parties were in agreement as to the lower court's resolution of the first two of the three issues, the parties abandoned argument on those issues. Subsequently, the court of appeals entered judgment relating only to the third issue. Long after the entry of judgment and the time for filing a petition for rehearing, the Federal Trade Commission filed a memorandum which asked the court of appeals to specifically affirm the lower court's resolution of the first two issues. The court of appeals granted the request and entered a "final decree" in which it incorporated the prior decree and added to it an affirmance of the first two claims. The Commission then filed a petition for certiorari to this Court challenging the court of appeals' determination of the third issue. The

petition would not have been timely filed if the first judgment was the final judgment for purposes of appeal. *Minneapolis-Honeywell,* at 208-10.

Because the memorandum filed by the Commission sought no alteration of what had been established by the first judgment but merely sought additional provisions, the Court refused to construe the memorandum as a motion to amend the previous judgment which would suspend the time for appeal.

> Moreover, the memorandum was labeled neither as a petition for rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. On the contrary, the Commission indicated that it was quite content to let the Court of Appeals' decision of July 5 stand undisturbed. Since we cannot treat the memorandum of August 21 as petitioner would have us treat it, we cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari.

Minneapolis-Honeywell, supra, at 210-211. The Court went on to hold that even though the second judgment was labeled the "final decree," it did not affect the finality of the first judgment for purposes of appeal because it "reiterated without change" everything which had been decided by the first judgment. *Id.* at 212.

This Court has refused to construe post-judgment filings in a manner which would suspend the time for appeal in other cases as well where the post-judgment filing did not seek to change any rights which had been established by the judgment. For example, in *Berman, supra,*

the court determined that suspension of a sentence in a criminal case did not affect the finality of the judgment because "[i]t does not secure reconsideration of issues that have been determined or change the judgment that has been rendered." *Berman, supra,* 302 U.S. at 213. Similarly, this Court has refused to construe a post-judgment motion to amend a remittitur to add the statement that a federal question was presented as a motion to amend the judgment which would affect the finality and appealability of the judgment because the "motion did not seek a reargument or rehearing on any part of the case," or to "reconsider any question decided in the case." *Dept. of Banking v. Pink, supra,* 317 U.S. at 266.

Under traditional principles of finality, therefore, a post-judgment motion which does not seek to change what has been established by the judgment does not suspend the finality of the judgment or the time for filing an appeal. *Cf. Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1942) (Where motion asked that rights which were already adjudicated be altered, it deprived the judgment of the finality which is essential to appealability).

B. Rule 4(a)(4) Of The Federal Rules Of Appellate Procedure And Rule 59(e) Of The Federal Rules Of Civil Procedure Embrace The Traditional Approach To Finality Of Judgments For Purposes Of Appeal.

The traditional approach to determination of the finality and appealability of judgments is compatible with and a natural consequence of the provision in F.R.A.P. 4(a)(4) which suspends the finality of a judgment upon the filing of a Rule 59(e) motion. Legislative history and case law demonstrate that a post-judgment motion which

does not seek to change what has already been established by the judgment is not a Rule 59(e) motion and, therefore, does not suspend the finality of the judgment under F.R.A.P. 4(a)(4).

Subdivision (e) was added to Rule 59 in 1946. This subdivision simply provides that "a motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment." The Notes of the Advisory Committee explain that subdivision (e) was "added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York,* C.C.A. 8, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." Notes of Advisory Committee on 1946 Amendment to Rules, 5 F.R.D. 433, 476 (1946). Thus, a Rule 59(e) motion is the same kind of motion which was encountered in *Boaz. See Boaz,* 146 F.2d at 322.

The motion in *Boaz* was a motion to reconsider *and change* rights which had already been adjudicated and not a motion for determination of supplemental relief. Indeed, *Boaz* repeatedly describes the issue as whether the trial judge had inherent power "to correct errors in proceedings [,] . . . to reconsider and correct the actions taken at the close of plaintiff's evidence." *Id.* Accordingly, the Tenth Circuit has described motions to alter or amend the judgment as "those which call into question the correctness of a judgment on some material point of fact or law, and may properly be cast in the form of a motion to reconsider, to vacate, to set aside, for reargument, or for rehearing." *St. Paul Fire & Marine Insurance Co. v. Continental Cas. Co.*, 684 F.2d 691, 693 (10th Cir. 1982). In discussing the scope of Rule 59(e), the Seventh Circuit

has pointed out that "[t]he sort of alteration that restarts all periods of time is one that 'changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered.'" *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986) (quoting *Minneapolis-Honeywell, supra*). Professor Moore has described Rule 59 as "an amalgamation of a motion for new trial at common law and the petition for rehearing in equity." 6A J. Moore, *Moore's Federal Practice*, par. 59.02 (2d ed. 1987).

Plainly stated, the *Boaz* type motion which is now authorized by Rule 59(e) is merely a motion to correct errors in a decision which has already been rendered. Because the purpose of Rule 59(e) is to allow the District Court to "correct its own errors," such a motion must necessarily seek to *change* something that had already been decided.

Indeed, this Court has consistently limited the scope of Rule 59(e) to motions which actually seek an alteration of the rights adjudicated in the first judgment. In *White v. New Hampshire Dept. of Emp. Sec.*, 455 U.S. 445 (1982), this Court granted certiorari to resolve the conflict regarding the scope of Rule 59(e) in a case involving a motion for attorney's fees under 42 U.S.C. § 1988. Finding that Rule 59(e) is invoked "only to support reconsideration of matters encompassed in a decision on the merits," not to the initial granting of relief which is "collateral to the main cause of action," the Court held that a motion for attorney's fees pursuant to § 1988 does not constitute a Rule 59(e) motion. *White, supra* at 450-52. Significantly, in *White*, the Supreme Court did not limit its inquiry to the history or nature of motions for attorney's

fees. Rather, the Court dealt with the question by reviewing the purpose and scope of Rule 59(e) in general.

> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following the entry of judgment. The question of the court's authority to do so had arisen in *Boaz v. Mutual Life Insurance Company of New York*, 146 F.2d 321, 322 (CA8 1944). According to their report, the draftsmen intended Rule 59(e) specifically "to care for a situation such as that arising in *Boaz*."
>
> Consistently with this original understanding, the federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. [cit.] By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply.
>
> . . .
>
> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. *It does not imply a change in the judgment, but merely seeks what is due because of the judgment.* It is, therefore, not governed by the provisions of Rule 59(e)."

Id. (emphasis added). Thus, *White* made it clear that Rule 59(e) was meant only to apply to motions which sought to "reconsider" and "change" the rights adjudicated in the judgment. *Id.* at 452.

In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), this Court combined the reasoning of *White* with traditional principles of finality to hold that

a post-judgment motion which did not actually seek an alteration of the rights adjudicated in the first judgment would not suspend the finality of the judgment for purposes of appeal. Although F.R.A.P. 4(a)(4) and Rule 59(e) did not control the outcome in *League of Women Voters* because the case involved a direct appeal from the District Court, the Court observed that the operation of F.R.A.P. 4(a)(4) and Rule 59(e) was analogous to the traditional rule of finality. *Id.*, at 373, n.10. Under both, "the filing of a petition for rehearing or a motion to amend or alter the judgment 'suspend[s] the finality of the [original] judgment; thereby extending the time for filing a notice of appeal 'until [the lower court's] denial of a motion . . . restores' that finality." *Id.*

League of Women Voters emphasized, however, "*that the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a post-judgment motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicated' in the court's first judgment.*" 468 U.S. at 373, n.10 (emphasis added). Moreover, after noting that the post-judgment issue had never been briefed prior to entry of the initial judgment, the Court looked to its prior analysis of the scope of Rule 59(e) in *White* to support its conclusion that the motion did not constitute a motion to amend which would suspend the finality of the judgment because it did not seek to change the rights which were established by the judgment. *Id.*

This Court again combined the reasoning of *White* with principles of finality and appealability in two recent cases. In *Buchanan v. Stanships, Inc.*, — U.S. —, 108 S.Ct. 1130 (1988), the Court reversed the Fifth Circuit's decision that a post-judgment motion for costs could be a Rule 59(e) motion. In explaining its decision, the Court again emphasized that a motion which does not seek to "change" what has been established by the judgment cannot be a Rule 59(e) motion:

> [T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White supra,* 455 U.S. at 451, 71 L.Ed.2d 325, 102 S.Ct. 1162. In *White* we held that a motion for attorney's fees under 42 U.S.C. § 1988 was not a Rule 59(e) motion. We reasoned that because § 1988 provides for fees independently of the underlying cause of action and only for a "prevailing party," a motion for fees required an inquiry "separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" [cit.] Such a motion therefore " 'does not imply a change in the judgment but merely seeks what is due *because of* the judgment.' "

Buchanan, supra, at 1131 (emphasis original). Moreover, the Court cited *League of Women Voters, supra* and *Eisen, supra,* both of which are based on general principles of finality, as authority for its conclusion that F.R.A.P. 4(a)(4) and Rule 59(e) were not intended to apply to a post-judgment request which "raises issues wholly collateral to the judgment in the main cause of action." *Id.* at 1132.

In *Budinich v. Becton-Dickinson and Company,* 108 S.Ct. 1717 (1988), the Court also addressed the *White* analysis and general principles of finality and appealability in an opinion which held that a post-judgment proceeding did not suspend the finality of an order effectively

terminating the litigation where resolution of the proceeding could not change any of the decisions embodied in the order. *Budinich* presented the question of whether a decision on the merits is final under § 1291 when the recoverability or amount of attorney's fees remains to be determined. In holding that the decision should be considered final and appealable regardless of whether the attorney's fees could be characterized as part of "the merits relief," the Court emphasized that the application of Rule 59(e) and F.R.A.P. 4(a)(4) must be governed by the practical, traditional principles of finality rather than by a characterization of the post-judgment relief.

> A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise the decisions embodied in the order. [cit.] We have all but held that an attorney's fees determination fits this description. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), we held that a request for attorney's fees under 42 U.S.C. § 1988 is not a motion "to alter or amend the judgment" within the meaning of Federal Rule of Civil Procedure 59(e) because it does not seek "reconsideration of matters properly encompassed in a decision on the merits." . . .
>
> The foregoing discussion is ultimately question-begging, however, since it assumes that the order to which the fee issue was collateral *was* an order ending litigation on the merits. If one were to regard the demand for attorney's fees as *itself* part of the merits, the analysis would not apply . . . .
>
> . . . Now that we are squarely confronted with the question, however, we conclude that the § 1291 effect of an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them.

> We have said elsewhere that "[t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." [cit.] Indeed, in the context of the finality provision governing appealability of matters from state courts to this Court, 28 U.S.C. § 1257, we have been willing in effect to split the "merits," regarding a claim for an accounting to be sufficiently "dissociated" from a related claim for delivery of physical property that "[i]n effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is *independent of, and unaffected by,* another litigation with which it happens to be entangled." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092 (1945). This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits" but rather preservation of operational consistency and predictability in the overall application of § 1291.

Budinich, supra, 108 S.Ct. 1720-1721 (emphasis added).

Thus, *Budinich* shifted the focus of analysis under F.R.A.P. 4(a)(4) and Rule 59(e) from the "merits" to the traditional, practical approach which looks to whether a decision which effectively disposes of the litigation is "independent of and unaffected by" the subsequent proceedings. Moreover, *Budinich* reiterated the *White* analysis insofar as the *White* analysis preserves "operational consistency and predictability in the overall application of § 1291." *Id.* In fact, the "collateral" analysis in *White*

provides a very practical approach to the determination of whether a post-judgment motion falls within Rule 59(e) for purposes of appeal which is totally consistent with the practical, traditional approach espoused by *Budinich*. Like the traditional approach, *White's* collateral analysis looks to whether the motion seeks "to correct an error" in or otherwise to "change" what has already been decided.

In sum, the approach espoused by this Court in *Budinich, League of Women Voters, Buchanan,* and *White* for determining whether a post-judgment proceeding falls within the scope of F.R.A.P. 4(a)(4) and Rule 59(e) is consistent with the practical, traditional principles of finality found throughout federal practice and procedure. These principles establish that where a subsequent proceeding is separable or collateral so that it could not change what has already been decided, it will have no effect on the finality and appealability of the prior judgment regardless of whether it may relate to "merits."

C. The Eleventh Circuit Erred In Holding That The Osternecks' Request For Prejudgment Interest Is A Rule 59(e) Motion Which Suspended The Finality And Appealability Of The January 30 Judgment.

The Osternecks properly filed their notice of appeal from the January 30 judgment on March 1, 1985. The January 30, 1985 judgment, when entered, was a final and appealable judgment under § 1291. The judgment was entered on a jury verdict upon trial of all of the Osternecks' remaining claims against all of the parties. (J.A. 6). The judgment adjudicated not only liability as to all parties, but also the compensatory relief awarded by the jury on the merits of all the claims. (J.A. 6). The judgment also awarded costs to the prevailing parties and post-judgment interest from the date of the judgment pursuant to 28 U.S.C. § 1961. (J.A. 6).

Moreover, the judgment was entered on a separate document pursuant to F.R.Civ.P. 58 and docketed pursuant to F.R.Civ.P 79(a). (J.A. 6). "The sole purpose of the separate document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal . . . begins to run." *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 384 (1978). *See also Exchange National Bank of Chicago, supra,* 763 F.2d at 290 (filing of judgment on separate document notifies parties that the judgment is final). A "'judgment' for purposes of the Federal Rules of Civil Procedure would appear to be equivalent to a 'final decision' as that term is used in 28 U.S.C. § 1291 [U.S.C.S. § 1291]. Federal Rule of Civil Procedure 54(a), for example, provides that 'judgment, as used in these rules includes a decree in any order from which an appeal lies.'" *Bankers Trust Co., supra,* at 384, n. 4. *See also* F.R.A.P. 4(a)(6) (a judgment is entered for purposes of appeal when it is entered in compliance with Rules 58 and 79(a)). Entry and docketing of the separate judgment in accordance with Rules 58 and 79(a), therefore, established that the judgment was final and that the time for appeal began to run from its entry on January 30, 1985.

The trial court's reservation of the issue of prejudgment interest did not affect the finality of the judgment under § 1291 because the remaining issue of prejudgment interest was entirely separable and could not change the rights which were established in the January 30, 1985 judgment. In fact, the trial judge expressly determined

that the issue of prejudgment interest was a "separate" issue, and immediately thereafter directed the clerk to enter final judgment "as soon as possible." (J.A. 5). The judgment, therefore, would qualify as final under Rule 54(b) as well as general principles of finality under § 1291.

Furthermore, the Osternecks' motion for prejudgment interest was not a Rule 59(e) motion which would suspend the finality of the judgment under F.R.A.P. 4(a)(4). The Osternecks' motion for prejudgment interest, unlike the *Boaz* motion, did not ask the District Court to "correct errors in" or "change" what had already been decided. In contrast to the *Boaz* type motion which sought a modification of the prior decree, the Osternecks' motion was substantially identical to the post-judgment motions in *White, supra, League of Women Voters, supra, Buchanan, supra,* and in *Budinich, supra. See also Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939) (holding that a petition in equity for attorney's fees is "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree."). Like those motions, the Osternecks' motion for discretionary prejudgment interest was only an independent proceeding which sought supplemental relief which was due because of the judgment and not a request for modification of anything that had been established by the January 30 judgment.[2] In fact, the award of prejudgment interest

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[2] Like the equitable attorneys fees discussed in *Sprague v. Ticonic Nat. Bank, supra,* the award of prejudgment interest in the present case was not provided by statute, but was independently based on the equitable powers of the federal district courts. *See Blau v. Lehman,* 368 U.S. 403 (1962); *Wolf v. Frank,* 477 F.2d 467 (5th Cir. 1973).

and the amended judgment expressly provided that all the provisions of the original judgment remain intact.

As pointed out by the Ninth Circuit in *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), cert. den. — U.S. —, 107 S.Ct. 324 (1986), *a post-judgment motion for prejudgment interest does not ask the court to reconsider or correct its own mistakes because the court has not previously considered or decided the issue.*

> Such a prejudgment interest motion does not ask the court to reconsider or correct its own mistakes, because the court has not previously considered or decided the issue. The motion addresses an issue collateral to the main cause of action, requiring an inquiry unrelated to the merits that cannot be made until the moving party has "prevailed" on the merits. Prejudgment interest compensates not for the *injury* giving rise to the action but for the *delay* between injury and judgment. [cit.] Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the later in terms of time.

Jenkins, supra, at 737 (emphasis original).

The Ninth Circuit's well-reasoned opinion in *Jenkins* demonstrates that the Eleventh Circuit's decision cannot withstand scrutiny. The Eleventh Circuit stated that its decision was influenced by "the other circuit courts of appeals . . . [which] have uniformly concluded that a motion for discretionary prejudgment interest must be filed pursuant to Rule 59(e)." *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1525 (11th Cir. 1987). The *Jenkins case*, however, established that the circuit courts have not uniformly concluded that a motion for discretionary prejudgment interest is a 59(e) motion. Indeed, in finding that a motion for prejudgment interest is not a Rule 59(e)

motion, *Jenkins* convincingly distinguished cases from other jurisdictions, including the cases relied on by the Eleventh Circuit. *Jenkins* correctly pointed out that the pre-*White* cases have no precedential value because they were decided before the Supreme Court clarified the scope of Rule 59(e). *Jenkins, supra,* at 738, n.43. In addition, *Jenkins* pointed out that cases decided immediately after *White* which did not consider *White's* analysis in determining whether a motion for prejudgment interest is a Rule 59(e) motion are likewise not decisive of the issue even though they may have acknowledged the *White* decision with regard to attorney's fees. *Id.* Such cases are flawed because they rely blindly on pre-*White* cases in holding that prejudgment interest motions are 59(e) motions without considering the *White* definition of Rule 59(e) or the legislative history behind the rule. Such cases, therefore, cannot control on this issue in light of the decisions of this Court and the legislative history which instruct that Rule 59(e) should apply only to motions which seek to correct something that has already been decided and not to motions seeking additional, collateral relief.

The *Jenkins* decision also demonstrates that the Eleventh Circuit's second rationale for finding that a motion for prejudgment interest is a Rule 59(e) motion must fail. Citing *Norte & Co. v. Huffines,* 416 F.2d 1189, 1191 (2d Cir. 1969), the Eleventh Circuit decided that the Osternecks' reliance on *White* was misplaced because "prejudgment interest is compensation which directly stems from the injury giving rise to the action." *Osterneck, supra,* at 1526. As *Jenkins* points out, however, the mere fact that

prejudgment interest compensates the plaintiff does not mean that the question of prejudgment interest is a substantive issue relating to the merits of the main cause of action.

> Prejudgment interest compensates not for the *injury* giving rise to the action, but for the *delay* between injury and judgment. [cit.] Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time.

Jenkins, supra, at 737 (emphasis original).

Of course, prejudgment interest constitues compensatory damages, just as the award of attorney's fees compensates a prevailing party for damages which would not have been suffered had the defendant not engaged in unlawful conduct. Prejudgment interest compensates, however, not for the injury giving rise to the action, but for the delay between the injury and the judgment. Thus, although prejudgment interest is considered compensatory, it "does not form the basis of the action, but is an incident to the recovery of the principal," and is only demanded "in respect of the detention" of the principal claim. *Stewart v. Barnes,* 153 U.S. 456, 462, 464 (1894).

Moreover, *Norte & Co., supra,* which was relied on by the Eleventh Circuit for the proposition that interest is compensation which directly stems from the injury giving rise to the action, does not hold that prejudgment interest relates to the merits of the action. Rather, *Norte & Company* merely held that prejudgment interest constitutes compensatory damages as opposed to punitive damages. Indeed, in its order granting the motion for pre-

judgment interest, the District Court cited *Norte & Co.* for precisely this point—that prejudgment interest compensates the plaintiff for the *delay* between recovery and the wrongdoing and is not meant to punish the defendant based on the merits of the plaintiff's claims. (J.A. 41).

Ultimately, however, the Eleventh Circuit's reliance on *Norte & Co.* and on such other cases as *CIT Corp. v. Nelson,* 743 F.2d 774, 775 (11th Cir. 1984), in support of its conclusion that the Osternecks' motion for prejudgment interest was a Rule 59(e) motion is erroneous because this question cannot be determined based on a characterization of prejudgment interest as "merits" or "non-merits" relief. Indeed, *Budinich,* in effect, rejected the very line of cases relied on by the Eleventh Circuit in its attempt to distinguish the Osternecks' motion for prejudgment interest from the type of motion encountered in *White. Budinich, supra,* 108 S.Ct. at 1721. As made clear by *Budinich, supra,* it does not matter whether the relief sought involves "merits." Rather, what is important is the "preservation of operational consistency and predictability in the overall application of § 1291." *Id.* Such operational consistency is found in the practical, traditional approach which looks to whether a decision which effectively disposes of the litigation is "independent of and unaffected by" the subsequent proceedings. *Id.*

Thus, *regardless* of whether prejudgment interest is considered to relate to the merits of the action, Rule 59(e) is not applicable to the Osternecks' motion for prejudgment interest because the Osternecks' motion did not request a change in what had already been decided. The motion merely requested new relief, sought as a result

of the judgment entered on the jury's determination of the merits. *See Budinich,* 108 S.Ct. at 1721; *Gordon v. Heimann,* 715 F.2d 531, 538, n.7 (11th Cir. 1983) ("F.R. Civ.P. 59(e) *is* applicable for the correcting of a mistake, but is *not* applicable for a claim for new substantive relief." (emphasis original)).

The Eleventh Circuit adopted two additional arguments in its opinion which have similarly been rejected by this Court. The Eleventh Circuit found that it was justified in treating the Osternecks' motion as a Rule 59(e) motion in order to avoid "the piecemeal appeal of non-final substantive judgments rendered by the District Court." *Osterneck,* 825 F.2d at 1526. This Court, however, rejected this rationale as a basis for construing a motion within the scope of 59(e) in *White. White,* 455 U.S. at 452-453. Instead, this Court found that the discretion of the district court will take care of the problem of untimely post-judgment motions which result in piecemeal appeals. *Id.* at 454. The concern for avoiding piecemeal appeals, therefore, does not justify construing the Osternecks' motion as a Rule 59(e) motion. Moreover, as a practical matter in the present case there would have been no danger of "piecemeal appeals" because the Eleventh Circuit held that the *merits* as well as the jurisdictional questions of the Osternecks' March 1, 1985 appeal should be consolidated with the July 1985 appeals for purposes of the briefing schedule and oral argument. (J.A. 48). *See also Brown Shoe v. United States, supra,* 370 U.S. at 310 (rejecting fear of piecemeal appeals where fear has no support in history).

The Eleventh Circuit also relied on the "amended judgment" label of the second judgment as a justification for declining jurisdiction. *Osterneck, supra,* at 1528, n.11. It is well-established, however, that an inaccurate label does not determine the time for filing an appeal. *See, e.g. Buchanan, supra,* at 1132; *Minneapolis-Honeywell, supra,* at 211; *Alimenta (U.S.A.), Inc. v. Anheuser-Busch,* 803 F.2d 1160, 1162-63 (11th Cir. 1986).

Thus, the Eleventh Circuit opinion is erroneous in many respects. It is erroneous because it did not consider the purpose and scope of Rule 59(e) as set forth in legislative history and decisions of this Court. It is erroneous because it blindly relied on cases which ignored the legislative history of and construction of Rule 59(e) adopted by this Court. It is erroneous because it relied on cases which were effectively rejected by this Court in *Budinich.* It is erroneous because it is based on technical labels rather than a practical, functional analysis in accordance with well-established principles of finality and appealability. For these reasons, the decision of the Eleventh Circuit in this case must be reversed.

II. The Eleventh Circuit's Dismissal Of The March 1, 1985 Appeal Should Be Reversed Under The "Unique Circumstances" Doctrine Even If This Court Were To Construe The Osternecks' Motion For Prejudgment Interest As A Rule 59(e) Motion.

Under the "unique circumstances" doctrine, and appeal should not be dismissed as untimely where the appellant relied on the statements or actions of the District Court in determining when to file a notice of appeal. *See Thompson v. Immigration and Naturalization Service,*

375 U.S. 384 (1964); *Wolfsohn v. Hankin,* 376 U.S. 203 (1964); *Harris Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215 (1962); *Butler v. Coral Volkswagen, Inc.,* 804 F.2d 612 (11th Cir. 1986); *Webb v. Dept. of Health and Human Serv.,* 696 F.2d 101, 105 (D.C. Cir. 1982); *Needham v. White Laboratories, Inc.,* 639 F.2d 394 (7th Cir. 1981); *Lieberman v. Gulf Oil Corp.,* 315 F.2d 403 (2nd Cir. 1963).

The Osternecks relied on the statements and actions of the District Court in determining when to file their notice of appeal in this case. For example, the Osternecks' determination that the January 30, 1985 judgment was the final judgment on the merits for purposes of filing a notice of appeal was the result of the District Court's repeated characterization of the January 30, 1985 judgment as the *final* judgment notwithstanding the pendency of the motion for prejudgment interest, (J.A. 44) and of the District Court's characterization of the motion for prejudgment interest as an issue "separate" from the judgment on the merits which was entered on January 30, 1985. (J.A. 4). The District Court's express designation of the prejudgment interest issue as a separate issue, its direction to the clerk to enter the judgment "as soon as possible" notwithstanding the reservation of the prejudgment interest issue, and the entry and docketing of the judgment pursuant to F.R.Civ.P. 58 and F.R.Civ.P. 79(a) sent a clear signal to the parties that the judgment was to be considered final for purposes of appeal notwithstanding the pending prejudgment interest issue. (J.A. 5).

The District Court also treated the January 30, 1985 judgment as final notwithstanding the pending motion for prejudgment interest when it denied as untimely E.T. Bar-

wick's motion for an extension of time to file a bill of costs and denied Barwick Industries' request for a stay of execution without giving bond. (J.A. 2, 35-36). Indeed, even in granting the motion for prejudgment interest, the District Court continued to refer to the January 30, judgment as the "final" judgment. (J.A. 44).

The clerk of the District Court treated the January 30, 1985 judgment as final when he charged an additional filing fee for the July 1985 notice of cross appeal from the order granting prejudgment interest, an action which was expressly incompatible with a characterization of the Osternecks' motion as a Rule 59(e) motion pursuant to F.R.A.P. 4(a)(4).

Moreover, until September 9, 1985, no party, even E & W, considered the Osternecks' motion to be a Rule 59(e) motion which would render all earlier notices of appeal ineffective. *See Osterneck, supra,* 825 F.2d at 1527, 1530. All parties filed notices of appeal from the January 30 judgment in March 1985. (R23-475-477, 482-484). Two parties stipulated that the Osternecks' March 15 notice of cross appeal was timely. (J.A. 37). E & W filed its notice of appeal from the award of costs on the January 30 judgment in June 1985 and failed to renew it after the award of prejudgment interest as would have been required if the Osternecks' motion for prejudgment interest were a Rule 59(e) motion. (R23-504). In addition, E & W affirmatively represented to the Eleventh Circuit in a brief filed April 22, 1985, which was subsequent to the time the motion for prejudgment interest was filed yet well before the time for filing a renewal notice of appeal had expired, that the January 30, 1985 judgment was the "final judgment" for purposes of appeal. (11th Cir. Rec., E & W brief filed April 22, 1985, at 7). In this brief, E & W pointed out that Defendants Talley, Keller and Barwick Industries, as well as the Plaintiffs, had all filed on March 1, 1985 "timely" notices of appeal from the "Final Judgment." *Id.* at 2-3, 7.

Because of these unique circumstances, the Eleventh Circuit erred in dismissing the Osternecks' appeal as untimely.

CONCLUSION

For the above reasons and based on the record in this case, the Petitioners respectfully request this Court to reverse the Eleventh Circuit's dismissal of the Osternecks' March 1, 1985 appeal and remand for consideration of the merits of the Osternecks' appeal against E & W.

Respectfully submitted,

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